In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-500

LOWELL M. BIRRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having used interstate wire communications in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1343. He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).

In essence, the evidence showed that petitioner had without authorization issued stock certificates for 100,000 shares in Drug Products Company, Inc., a virtually defunct corporation, as collateral for a bank loan, misrepresenting that the stock certificates were genuine (Pet. App. A 2-3).

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Petitioner argues that it was error to have denied him a hearing on his unsupported allegation that the grand jury never passed on the terms of the indictment, that the giving of an "Allen" charge when the jury was divided 8–4 for acquittal was prejudicial, and that the invocation of the Fifth Amendment privilege against self-incrimination by a witness in response to certain questions on cross-examination denied him the right to confrontation. Each of these contentions is adequately answered by the opinion of the court below on which we principally reply.

We add a few additional comments.

1. In denying a pretrial hearing as to the indictment claim, Judge Frankel correctly pointed out that unlike *Gaither* v. *United States*, 413 F. 2d 1061 (C.A.D.C.) (upon which petitioner heavily relies), where the court reversed a conviction because the jury had voted not upon an indictment but only upon a presentment, the indictment subsequently having been drafted by the United States Attorney's office and signed by the foreman, "the peculiar technique of 'presentment' • • • does not prevail here." *United States* v. *Birrell*, 69 Cr. 583, slip op. 2 (S.D.N.Y.). The government further pointed out in its brief below that shortly before trial Judge Bryan inspected the "True Bill" certificate and read into the record its contents which established that more than the requisite number of jurors had voted for the finding of the indictment (Tr. May 25, 1970, pp. 21–22). Although petitioner questions the sincerity of the government's representations (see Pet.

5–6), we are advised that the custom in the Southern District of New York is for the Assistant United States Attorney to submit a draft indictment to the grand jury and then leave the room before a vote is taken. Thus the prosecution is not personally aware of the number of grand jurors who vote. In such circumstances, reliance on a presumption of regularity is proper, absent any showing to the contrary. As the court of appeals held, petitioner has shown nothing to the contrary, relying only on pure speculation (Pet. App. 10).

2. As to the "Allen" charge, although several circuits have recently determined to eliminate it for the future under their supervisory authority (see, *e.g.*, *United States* v. *Thomas*, No. 22,768, C.A.D.C., *en banc*, decided September 14, 1971), no court of appeals has held that the traditional "Allen" instruction is *per se* coercive or constitutes reversible error. Here, as the court of appeals observed, any coercive effect on minority jurors was favorable to petitioner since the jury was divided 8–4 for acquittal when the charge was given.

3. As to the invocation of the Fifth Amendment privilege by the witness, the court below properly held that this did not deny the right of effective confrontation or require striking the witness' testimony since the invocation of the privilege occurred as to collateral matters at most pertinent for impeachment. See, in addition to the *Cardillo* case cited at Pet. App. A 5, *Fountain* v. *United States*, 384 F. 2d 624, 627–629 (C.A. 5), certiorari denied, 390 U.S. 1005.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.